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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN MORRIS and KELLY  
McDANIEL, on behalf of themselves and all  
others similarly situated,

Plaintiffs,

v.

ERNST & YOUNG, LLP, and ERNST &  
YOUNG U.S., LLP,

Defendants.

Case No. 12-cv-04964-RMW (HRL)

[Assigned for all purposes to Judge Ronald M.  
Whyte]

**SECOND STIPULATION AND  
[PROPOSED] ORDER TO EXCEED  
APPLICABLE PAGE LIMIT FOR  
MOTION TO DISMISS, OR IN THE  
ALTERNATIVE, STAY PROCEEDINGS  
AND COMPEL ARBITRATION  
BRIEFING**

Date: February 15, 2013

Time: 9:00 a.m.

Ctrm: 6

1 WHEREAS the parties have met and conferred and agreed to each exceed the applicable page  
 2 limit for the opposition and reply briefing to the Defendants' **MOTION TO DISMISS, OR IN THE**  
 3 **ALTERNATIVE, STAY PROCEEDINGS AND COMPEL ARBITRATION** by ten (10) pages.

4 WHEREAS a Stipulation and [Proposed] Order To Exceed Applicable Page Limit For Motion  
 5 To Dismiss, Or In The Alternative, Stay Proceedings and Compel Arbitration Briefing (the  
 6 "Stipulation") was filed on January 23, 2013 (Dkt. No. 43).

7 WHEREAS the Court denied without prejudice to re-file the Stipulation for failure to include in  
 8 the Stipulation the reasons, consistent with Civil Local Rule 7-11(a), for seeking to exceed the page  
 9 limits (Dkt. No. 46).

10 WHEREAS Plaintiffs believe the reasons necessary to submit a memorandum exceeding the  
 11 page limit up to an additional ten (10) pages includes a significant and extensive judicial history  
 12 interpreting the very arbitration agreement at issue that was not addressed in Defendants' motion. This  
 13 includes, Plaintiffs maintain, finding the subject agreement unenforceable in circumstances which  
 14 while different in some respects are sufficiently similar to control the result here. Hence, the need for  
 15 additional pages to address the numerous issues include the following reasons:

- 16 1. First, the agreement Defendants seek to enforce does not provide for shifting of costs and  
 17 expense, or in other words allow for arbitrator discretion, where the relevant statutes  
 18 unconditionally require costs and expenses to be shifted to the employer. See, *Sutherland*  
 19 *v. Ernst & Young LLP*, 768 F.Supp.2d 547 (S.D.N.Y. 2011) ("Sutherland I"); *Sutherland v.*  
 20 *Ernst & Young LLP*, 2012 U.S. Dist. LEXIS 5024 (S.D.N.Y. January 13, 2012) ("Sutherland  
 21 II");
- 22 2. Second, the history includes this Court's finding of waiver by Defendant of a claim to  
 23 arbitration in *Ho v. Ernst & Young, LLP*, a putative class action in which both Plaintiffs  
 24 were putative class members and which Plaintiff Morris participated, *inter alia*, by giving a  
 25 declaration and sitting for a deposition. See, *Ho v. Ernst & Young, LLP*, 2011 U.S. Dist.  
 26 LEXIS 106658 (N.D. Cal. Sept. 20, 2011), *Order Denying Motion for Leave to Move For*  
 27 *Reconsideration (Ho Dkt. No. 302, October 19, 2011)*. Whether such wavier applies to all

- putative class members, or at least to those, like Mr. Morris, who specifically identified his personal dispute with Defendant and was subjected to discovery, apparently is an issue of first impression;
3. Third, the cost of proceeding in individual arbitration proceedings under the arbitration agreements at issue here have been found to be so high that individual arbitration would not allow the participants to “effectively vindicate their statutory rights.” See *Sutherland I* and *Sutherland II*. Where arbitration must be conducted on an individual basis, but class proceedings in Court would allow those statutory rights to be vindicated. See also, *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.)*, 667 F.3d 204 (2d Cir. 2012)(“*Amex III*”), *Nat’l Supermarkets Assoc. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants’ Litig.)*, 634 F.3d 187, 2011 U.S. App. LEXIS 4507 (2d Cir., 2011)(“*Amex II*”), and *In re Am. Express Merchs. Litig.*, 554 F.3d 300 (2d Cir. 2009)(“*Amex I*”)(collectively hereinafter the “*Amex Trilogy*”); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. Wash. 2012);
  4. Fourth, Plaintiffs maintain the findings in *Sutherland II* could be collateral estoppel;
  5. Fifth, Plaintiffs maintain the National Labor Relations Board holding in *D.R. Horton, Inc. v. Cuda*, NLRB Case No. 12-CA-25764, 357 NLRB No. 184, (Jan. 3, 2012) that a class/collective action waiver imposed in an agreement required as a condition of employment to be a violation of Section 7 of the National Labor Relations Act and a violation of the *Norris LaGuardia Act* deserves deference. Accordingly, Plaintiffs need to address those issues; and
  6. Sixth, the Plaintiffs will seek to address the issue of waiver not only as a choice of law issue as touched upon in *Ho v. Ernst & Young, LLP*, 2011 U.S. Dist. LEXIS 106658 (N.D. Cal. Sept. 20, 2011), but also the separate issue of waiver by moving to compel arbitration only after seeking to transfer this matter from a sister court and then seeking to relate the matter to other cases.

WHEREAS, Defendants do not oppose Plaintiffs' request for additional pages, but seek an equal extension for the reply in the event the Court grants Plaintiffs' request.

THEREFORE IT IS HEREBY STIPULATED by and between the parties hereto through their respective undersigned counsel that:

1. Plaintiffs shall have up to thirty-five (35) pages for their Memorandum of Points and Authorities In Opposition to Defendant's Motion To Dismiss, Or In the Alternative, Stay Proceedings and Compel Arbitration; and

2. Defendants shall have up to twenty-five (25) pages for their Memorandum of Points and Authorities In Reply to Plaintiffs' To Memorandum of Points and Authorities In Opposition to Defendant's Motion To Dismiss, Or In the Alternative, Stay Proceedings and Compel Arbitration.

Dated: January 24, 2013

/s Ross L. Libenson

Ross L. Libenson  
HOFFMAN LIBENSON SAUNDERS & BARBA  
Attorney for Plaintiffs

Dated: January 24, 2013

/s Gregory W. Knopp

GREGORY W. KNOPP  
AKIN GUMP STRAUSS HAUER &  
FELD LLP  
Attorney for Defendant

*(This stipulation has been approved by Gregory W. Knopp)*

Because the court has agreed to extend the filing deadline for the opposition papers to Monday, January 28, the court likewise extends the filing deadline for the reply papers to Monday, February 4.

**ORDER**

PURSUANT TO STIPULATION IT IS SO ORDERED.

Dated: January 25, 2013

  
United States District Judge